Supreme Court, U. S.
FILED
OCT 17 1980
MICHAEL RODAK, JR., CLERK

No. 80-712

The Supreme Court of the United States

October Term, 1980

PETER J. ABDELLA, Petitioner

v.

STATE OF WISCONSIN, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE THIRD DISTRICT COURT OF APPEALS STATE OF WISCONSIN. MADISON, WISCONSIN

PETER J. ABDELLA
Petitioner Per se
1401 Lake Drive
Shawano, Wisconsin 54166
Phone (715)526-5530

Ms. MARY M. LIEDTKE
District Attorney
Price County
Phillips, Wisconsin 54555

QUESTIONS PRESENTED

Whether the Petitioner was deprived of his rights under Section 1. Articule 14 to the United States Constitution in that:

(1) The Appellat Court revised the basis on which petitioner was convicted.

(2) The Petitioner was convicted on a record completely barren of any evidence of guilt.

(3) Convicted of violating an Administrative Code, which under a penal provision was so indefinate and vague as to afford no acertainable standard of criminality.

(4) Convicted of violation of an Administrative Code, so broad and vague, as to create a classification within a classification.

(5) When the lower Court over objection by Petitioner instructed the jury they must bring in a guilty verdict , ommitting the all important, Ag 114.02 Misrepresentations: No person in soliciting advance fees or contracts therefor shall make any of the following representations contrary to fact.

Whether the Petitioner was deprived of his rights under the First Amendment to the United States Constitution which protects Petitioner freedom of speech.

TABLE OF CONTENTS

QUESTIONS PRESENTED 1, 2

OPINIONS BELOW 3

JURISDICTION 4

CONSTITUTIONAL PROVISIONS 4,5

STATEMENT OF THE CASE..... 6-12

REASONS FOR GRANTING WRIT 13-18

APPENDIX "A"..... 1a
Order of Wisconsin Supreme Court

APPENDIX "B" .....

Decision of Third District Court

of Appeal 2a-11a

APPENDIX "C" Order of trial

Court..... 11a-16a

OBJECTIONS OF JURY INSTURCTIONS ..16a-18a

MOTION FOR DIRECTED VERDICT..... 18a-20a

TESTIMONY OF STATE's WITNESS.... 20a-24a

TABLE OF AUTHORITIES CITED

Batavian National Bank of La Crosse
v. S & H Inc.
89 N.W. 2d 309, Wis. 565..... 15

Di Palla's Estate
39 A. 2d 519,530 Pa. 408..... 14

Domeyer v. O'Connell
lII., 2 N.E. 2d 830, 364, lII,
467, 108 A.L.R. 476..... 15

Dunn v. U.S.
18 U.S.C.A. 1623, 1623(c) 99 S. Ct...16
Jackson v. Virginia
99 S. Ct. 278..... 17
HM Distirbutors Inc. v. Department
of Agriculture.
55 Wis. 2d 261,198 N.W. 2d 598..... 16
New York Central R. Co. v. General
Motors Corp.
D. C. Ohio, 182 F. 291..... 14
U.S. Radio Corp. of America
U.S. v. Radio Corp. of America.
D. C. Del. 117 F. Supp. 449..... 14
Schuhkneckt v. Robers.
212 N.W. 657, 192 Wis. 275..... 14
Schmidt v. Barr.
165 N.E. 131.135, 333 ILL, 494
65 A.L.R. 1,..... 15
West View Corp. v. Alson
65 S.E. 2d 406, 208 Ga. 122..... 15

CONSTITUTIONAL & STATUTORY PROVISIONS

United States Constitution
First amendment..... 4,5

United States Constitution
Fourteenth Amendment Section 1.... 5

CHAPTER 114 WISCONSIN ADMINISTRATIVE CODE.....5

OPINIONS BELOW

The order of the Supreme Court of the State of Wisconsin in State of Wisconsin, Respondnet, V. Peter J. Abdella, Appellant, (Docket 79-086-CR) has not been reported. A copy is appended to this Petition as Appendix "A",. The decision of the Third District Court of Appeals, (Docket 79-086-CR) dated December 11. 1979 has not been reported. A copy is appended t o this Petition as Appendix "B". The order of the Circuit Court of Price County, Wisconsin dated December 28.1978, (Docket No. 79-086-CR) has not been reported. A copy is appended t o this Petition as Appendix "C".

JURISDICTION

The decision of the Third District Court of Appeals, dated December 11, 1979 has not been reported. A copy is appended to this Petition as Appendix "B". The order of the Wisconsin Supreme Court, dated July 8, 1980, has n ot been reported. A copy is appended to this Petition as Appendix "A"

STATUTORY PROVISION TO REVIEW THE JUDGMENT BY WRIT OF CERTIORARI.

A thorough search discloses no such provision, a telephone call to the Clerk of the Wisconsin Supreme Court requesting the statutory provision, was of no results.

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting and establishment of religion, or prohibiting the free excerise thereof;

or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the Constitution of the United States Section 1. provides:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CHAPTER 114 WISCONSIN ADMINISTRATIVE CODE.

Ag 114.03 Contracts. No person soliciting advance fees shall fail to furnish the property owner contracting therefor with a true copy of the entire contract, which shall specifically identify each advertising medium to be used and the size and number of advertising insertations to be made therein.

The jurisdiction of the Court is invoked under the provisions of 28 U.S. Code Sec. 1257 (3)

STATEMENT OF THE CASE

On April 6. 1977, the Petitioner Peter J. Abdella, doing business as the Locators, Antigo, Wisconsin, entered into a contract for advertising services to be rendered of the Catawba John Deere Sales, with Gordon Helland owner of said business.

LOCATORS METHOD OF OPERATION

Since 1951, The Locators had used Metropolitan and National publications offering a free list of Wisconsin Real Estate, Businesses, Farms, Recreational property, etc., Direct from seller.

This enabled the agency to accumulate a large back-log of prospective buyers for all types of real estate and business opportunities.

Other ads were placed in various mediums to inform owners of real estate and businessess, that " Hundreds of City and out of State prospects for all types of real estate and business opportunities.

No listing contract, No brokerage fee, The direct owner to seller method.

As a result of an ad placed in the Milwaukee Journal, Sunday April 3. 1977 a telephone call was received from Mr. Gordon Helland, owner of Catawba Sales, on Monday April 4. 1977, stating he had a business he wanted to sell and wanted more information as to th e method. The method was discussed in detail, explaining the difference between an advertising agency, as to real estate brokerage. The advantages of an agency as compared to an individual doing his own, also, that a personal inspection would be made of the offering to determine if in the opinion of the agency the offering is merchantable. That at that time the advertising fee would be determined, for which 120 days of advertising services would be performed through a prospectus to be prepared of the offering

which would be forworded to all screened and qualified prospects on file as well as those inquiries received within the advertising period. and, further that the inspection would be mad e with-any obligation. Mr. Helland requested an early date.

On April 6, 1977, Mr. Abdella, drove the 120 miles from Antigo to Catabwa, at which time the method was again explained in detail. Whereupon Mr. Helland agreed to contract for the services, and considerable time was spent obtaining information for preparation of adetailed prospectus. Whereupon the following contract was entered into: Forma l parts omitted:

Received of Catawba Sales John Deere Dealer.

The sum of Six Hundred and Twenty Five Dollars for one hundred and twenty days of advertising services to be rendered of the Real Estate, Business, Fixtures, and Equipment of the Catawba property described above.

Property located in the Village of Catawba.

Full asking price of the real estate is Forty Seven Thousand & Five Hundred Dollars, plus fixtures and equipment at Three Thousand and Four Hundred Dollars, plus inventory at cost about $12.000.00

In making application for service on the above described proposition, it is distinctly understood that there will be no demand for a commission or broker fee, as The Locators do not operate as agent or broker.

THE LOCATORS agree to take the above application and advertise it through their method of forwording information to screened and qualified prospects obtained as a result of their advertising method.

Balance of advertising fee is Six Hundred & Twenty Five Dollars, but, is not due and payable until results are obtained through their efforts

Dated: April 6. 1977

ADVERTISER: Gordon Helland

THE LOCATORS: Peter J. Abdella.

On July 13. 1978 fifteen months later a criminal complaint was signed by Michael J. Brown, investigator for Wisconsin Deptartment of Agriculture and Consumer Protection, and a summons was issued by the District Attorney for Price County,

charging your Petitioner with the following 3 Counts, in violation of Chapter Ag. 114 State Department of Agriculture Rules.

Ag. 114.02 Misrepresentations. No person soliciting advance fees or contracts therefor shall make any of the following representations contrary to fact:

COUNT I

Did intentionally fail to obey Section Ag. 114.02 (4) which states:

> "That he or any other person whom he represents will furnish a list of qualified prospects who are interested in buying the type of property involved.

COUNT II

Did intentionally fail to obey Ag. 114.02 (8) Which states:

> "That he or any other person whom he represents will perform any act or engage in any service beyond the acts or services required by the terms of any written agreeement between the parties.

COUNT III

Did intentionally fail to obey Section Ag. 114.03 Which states:

> CONTRACTS. No person soliciting advance fees shall fail to furnish the

property owner contracting therefor with a true copy of the entire contract, which shall specifically identify each advertising medium to be used and the size and number of advertising insetions to be made therein.

FEDERAL QUESTIONS RAISED AT TRIAL

Record page 70

THE COURT: Mr. Abdella, 1 believe that you said that you had a motion to make for a directed verdict ?

MR. ABDELLA: Your Honor, 1 would ask the Court for a directed verdict at this time of not guilty on all three counts. As the Court heard, the witness for the State was very honest, he wasn't attempting to lie, distort facts, but he couldn't have done a better job than if 1 had asked him to. He denied each and every allegation that 1 had intended to commit or committed any crime. And, As the Court is well aware, the burden of proof is on the State and there is no proof here. there is no evidence to be controverted; he agrees that he under-

stood that there would be no newspaper advertising, he agrees with that.

OBJECTION TO JURY INSTRUCTIONS IGNORED

Record page 77.

OBJECTION TO JURY VERDICT PREPARED BY THE COURT

Record page 13 . Transcript of hearing on Motions. December 28. 1978. Portions of record appended to this Petition as Appendix "C"

FEDERAL QUESTIONS RAISED IN APPELLATE COURT.

Page 9, 9&10, 10&11, 11, & 12 of brief.

FEDERAL QUESTIONS RAISED IN PETITION TO REVIEW BY WISCONSIN SUPREME COURT

Petition page 1, Ag. 114 unconstitutional

Petition page 3 Ag. 114 Unreasonable classification.

CONSTITUTIONAL LAW 208(1) page 11& 12

DISCRIMINATION page 14 &15

Portions of the record appended to this Petition as part of Appendix "C"

REASON FOR GRANTING WRIT

The Third District Court of Appeals for the State of Wisconsin has so far departed from the accepted and usu al course of judicial proceedings, and has sanctioned such departure by a lower court. as to call for the excerise of this Court's power of supervison.

CONTRACT IN ACCORDANCE WITH THE PRIMARY & CARDINAL RULES OF CONTRACTS AS PRACTICED BY ALL THE COURTS OF THE LAND.

The complaining witness testified, he knew the difference between an advertising agency and real estate brokerage. He understood he was to receive 120 days of advertising services, of the agencies method. He understood the method to mean a prospectus was to be prepared of the offering and forworded to all screened and qualified prospects on file as well as those received during the 120 days of advertising services to be rend-

ered, he understood that there would be no ads placed other than the prospectus, he admitted receiving the prospectus, agreed he had not been solicited, but, rather that he had contacted the agency by telephone. In U.S. v. Radio Corp. of America. D.C. Del. 117 F. Supp. 449. The Court held,

> "If the language of a contract is clear, its meaning must be followed. And, there is no room for recourse to consideration of public policy.

In Schuhkneckt v. Robers. 212 N.W. 657 192 Wis. 275. The Court held:

> "Where contract is clear, unequivocal, and unambiguous its meaning, and the intention, must be determined from its contents alone.

In New York Central R. Co. v. General Motors Corp.D.C. Ohio, 182 F. 291. The Court held:

> "A conventor is not to be held beyond his undertaking, and he may make his undertaking as narrow as he likes."

In Re. Di Palla's Estate. 39, A. 2d 519, 532 Pa. 408. The Court stated:

"In the absence of fraud, accident, or mistake, the written and sealed agreement of persons of full age and under no legal disability may not be disregarded."

In Ga. West View Corp. v. Alson. 65 S.E. 2d 406, 208 Ga. 122. The Court held:

"A court cannot place on either party a contract greater obligations or burdens than the contract itself."

In Bavabian National Bank of La Cr osse v. S & H.89 N.W. 2d 309, 3 Wis. 2d 565, The Court held:

"It is not within the province, function, duty, or power of the court to alter, revise, modify, extend, rewrite, or make a new contract, or different contract for the parties, whether in the guise of construction or otherwise; its duty is confined to the construction or interpretation of the one they made for themselves."

In Schmidt v. Barr.165 N.E. 131, 135, 333 Illionois, 494, 65 A.L.R. I, The Court held:

" A court is without authority to compel a party to do something he did not contract to do."

In Domeyer v. O"Connell. 11, 2 N.E. 2d 830, 336 lII, 467, 108 A.L.R. 476,

The Court said:

> "Intention to omit is not to include. Absence of provision from contract is evidence of intention to exclude such provision."

APPELLATE COURT NOT ONLY IGNORED THE CARDINAL RULES OF CONTRACTS BUT REVISED THE BASIS OF THE CONVICTION.

The Appellate Court citing HM Distributors of Milwuakee Inc. v. Department of Agriculture, 55 Wis. 2d 261, 198 N.W. 2d 598 (1972) The case involving "Chain distributor Schemes) the Appellate Court stated: "Although HM Distributors dealt with a different regulation than before us, the reasoning of the case is applicable here. This rationale collides with the United States Supreme Court citing Criminal Law U.S. 1979, 18 U.S.C.A. 1623, 1623 (c) Dunn v. U.S. S. Ct. 2190 wherein it was stated:

> "To ensure that legislature speaks with special clarity when making boundaries of criminal conduct, Court's must decline to impose punishment for actions that are not plainly and unmistakably proscribed."

In the same case the Court stated:

> "Appellate Court's are not free to revise basis on which defendant is convicted simply because same result would likely be obtained on retrial

THE APPELLATE COURT ERRED IN CONCLUD_-

ing there was credible evidence to

support the verdict;

The facts simply put is the contract

itself. The statement of the District

Attorney Ms. LIEDTKE page 13 trans-

cript of Motions after Verdict:

> "We are not saying that he failed to advertise, or that he advertised deceptively. "e are saying that he gave a contract and it did not state what he was going to do."

The United States Supreme Court in

Jackson v. Virginia, 99 S. Ct. cited
278
criminal constitutional law 1159, 2 (7)

reasonable doubt, U.S. Va. 1979. U.S.

C. A. Const. Amend. 14 Stating:

> "The critical inquiry on review of the sufficiency of evidence to supp-ort a finding of guilt..or criminal conviction must not simply to deter-mine whether the jury was proper ly instructed, but to determine whether

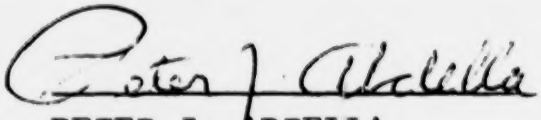
record evidence could reasonably support a finding of guilt beyond a reasonable doubt; the relevant question is whether, after reviewing evidence in light most favorable to prosecution, any rational trier of fact could have found the essential element of the crime beyond a reasonable doubt."

CONCLUSION

Because this case represents such a radical departure from accepted rules and principles governing contract law both civil and criminal, and for reasons stated herein, the Petition for a Writ of Certiorari should be granted.

Dated: October 21. 1980

Respectfully Submitted



PETER J. ABDELLA
Petitioner Per se.

Peter J. Abdella
1401 Lake Drive.,
Shawano, Wisconsin 54166
Telephone (715) -525-5530

APPENDIX

No. 79-086-CR

SUPREME COURT
STATE OF WISCONSIN

Madison, July 8, 1980

To Mary M. Liedtke
District Attorney
Price County Courthouse
Phillips, WI 54555

Peter J. Abdella
1401 Lake Drive.,
Shawano, WI 54166

The Court today announced an order in your case as follows:

No. 79-0860CR State v. Abdella

A petition for review pursuant to sec. 808.10, stats., having been filed on behalf of defendant-appellant-petitioner Peter J. Abdella and considered by the court,

IT IS ORDERED that the petition is denied, without costs.

MARILYN L. GRAVES
Clerk of Supreme Court.

APPENDIX "A"

APPENDIX "B"

IN COURT OF APPEALS DISTRICT III

COURT OF APPEALS DECISION DATED AND RELEASED DECEMBER 11, 1979

No. 79-086-CR
STATE OF WISCONSIN

STATE OF WISCONSIN,
Plaintiff-Respondent

v.

PETER J. ABDELLA,
Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Price County: DAVID A. CLAPP, JUDGE. Affirmed.

DEAN, P. J. Peter Abdella appeals from a judgment of conviction and from an order denying post-conviction relief. A jury convicted Abdella of violating Wis. Adm. Code, sec. Ag. 114.03, a regu la-tion enacted under sec. 100.20 (2). Stats. relating to unfair trade practices. Section Ag 114.03, which regulates the listing and advertising of real estate states:

> No person soliciting advance fees shall fail to furnish the property owner contracting therefor with a true copy of the entire contract, which shall identify each advertising medium to be used and the size and number of advertising insertions to be made therein.

A violation of this section is made punishable pursuant to sec. 100.26 (3) Stats.

Abdella, doing business as The Locators, entered into a contract with Gordon Helland for advertising services for the sale of a farm implements dealership owned by Helland. According to the contract, The Locators agreed to advertise the dealership "through their method." of forwording information to screened and qualified prospects obtained as a result of their advertising method." The contract did not say what The Locators "advertising method" was. The contract also did not identify

the advertising medium to be used nor did it identify the size and number of insertions to be made. Helland paid the Locators $625.00 for its services.

Abdella, in a pro se brief, lists a wide variety of constitutional objections to Wis. Adm. Code, sec. Ag 114.03, and the statute under which it was enacted, sec. 100.20 (2), stats, interferes with the principle of freedom of contract. He claims that Gordon Helland is an intelligent businessman who knew exactly what he was contracting for. Therefore, Abdella claims, a regulatory agency has no right to insist that a contract consist of additional terms not bargained for by the parties. He also claims that administrative regulations denies his freedom of speech.

The supreme court, in HM Distributors

of Milwaukee, Inc. v. Department of agriculture , 55, Wis. 2d 261, 198 N.W. 2d 598 (1972),addressed these issues in the context of administrative regulations prohibiting chain distributor schemes. The regulations in HM Distributors, like the regulation involved in this case, were enacted under the unfair trade practices statute, sec. 100.20 (2), Stats. Addressing the issues of freedom of press of speech, the court in HM Distributors stated:

> The proverb stated that "A fool and his money are soon parted," but we did not suspect that accelerating the parting enjoyed constitutional protection...We do not find anywhere in the United States Constitution..authority for denying the state the right to prohibit "unfair methods of trade practices."
>
> Nor can the proposition that a con man has a constitutional right to defrsud the public as long as he reveals the details of his scheme to the victim be based on the claim that the First Amendment right of freedom of speech is invaded by regulating or prohibiting unfair trade practices..55 Wis. 2d 272, 198 N.W. 2d 604-605

Although HM Distributors dealt with a different regulation than before us. the reasoning of that case is applicable here. Mr. Helland is within the class of persons sought to be protected from real estate advertisers. The regulation says that a person contracting for advertising from a solicitor must be told specifically what he is going to get for his money. We cannot conclude that the regulation is unreasonable or unconsitutionally suspect.

Abdella also claims that he was denied his right to due process, because a public hearing was not held before the complaint was sworn. As authority for this proposition, he Apparently is referring to sec. 100.20 (2), Stats., which reads in part:

> The department, after public hearing, may issue general orders forbidding methods of competition in business or trade practices in business which are determined ..to be unfair.

Abdella misinterprets the public hearing requirement in sec. 100.20 (2) Stats. The statute only requires a public hearing before the department issues a general regulation. This step was comlied with before Wis. Adm. Code, sec. Ag 114. 03, was issued. See State Department of Agriculture. Notice of Hearing, June 17, 1958 (Docket No. 549). Nowhere in the stautues is there any requirement that an individual hearing be held before each and every complaint is worn out.

Abdella next complains that the regulation is discriminatory, because newspapers that accept real estate ads are not required to comply with Wis. Adm. Code, sec. Ag 114.03. We find no merit in this contention. The legislature classification is presumed to be valid. State ex rel. Hammermill Paper Co. v. La Plante, 58 Wis. 2d 32, 205 N.W. 784 (1973). If there is any reas-

onable basis for the classification, then the statute or regulation wil l be validated. Omernik v. State, 64 Wis. 2d 6, 218 N.W. 2d 734 (1974)

The department of Agriculture, in issuing its regulatinns concerning the listing and advertising of real estate, was responding to a specific problem caused by solicitors, See State Department of Agriculture Findings of Fact & Conclusions,.October 10, 1958 (Docket No. 549). Newsppaers are not solicitors but are in a different class altogether.

Finally, Abdella claims, without elaboration, that sec. 100.26 (3), Stats., is unconstitutional. The supreme court in State v. Lambert, 68 Wis. 2d 253, 529, 229 N.W. 2d 622,625 (1975), in addressing this issue, stated:

> The legislature may constitutionally create a criminal penalty for violating of the Departments rule. Sec. 100. 26 (3). Stats., makes a violation for

> any provision of sec. 100.20 or any regulation made under that section punishable by fine or by imprisonment or by both . The propriety and constitutionally of imposing criminal sanctions for the violation of a properly enacted administrative regulation was unheld in the United States v. Grimaud (1911), 220 U.. 506, 31 S. St. 480, 55 L. Ed. 563.

Abdella was not denied any of his constitutional rights.

JURY INSTRUCTIONS

Abdella alleges that the jury instructions were in error. The reason he gives for this allegation is that "the instructions were such as to leave the jury no alternative but to bring in a guilty verdict."

Abdella did not object to the instructions at trial, although they were qvailable for examination before they were read to the jury. We will not review this issue for the first time on appeal. Allen v. State Farm & Casualty Co. 71, Wis. 2d 212, 238 N.W. 2d 104 (1976).

SUFFICIENCY OF THE EVIDENCE

Abdella finally alleges, again without any elaboration, that the evidence presented at trial was insufficient to support a jury finding of guilty, ON review, this court will uphold a jury verdict if there is any credible evidence to support it. Bergman v. Insurance Co. of North America, 49 Wis. 2d 85, 181 N.W. 348 (1970)

Reviewing the record, we conclude there is credible evidence to support the jury's verdict. The jury had before it the advertising agreement between Abdella and Gordon Helland. The agreement referred to an "advertising method." The agreement did not mention the advertisig medium to be used nor did it identify the size and number of insertions to be made. Helland testified that he received a copy of the agreement and a copy of the prospectus. He further testified that

he had a seris of telephone contacts with Abdella, but he never was told specifically what the "advertising method" consisted of. Since there was sufficient evidence to support the jury's verdict. We cannot conclude that the trial court erred in denying Abdella's motions for a directed verdict, and for a new trial.

By the Court.---Judgment and order affirmed.

Not recommended for publication in the official reports.

APPENDIX "C"

STATE OF WISCONSIN CIRCUIT COURT PRICE COUNTY.

==========

STATE OF WISCONSIN
Plaintiff

vs.

Case No.79-086CR

PETER J. ABDELLA,
Defendant.

==========

JUDGMENT OF CONVICTION, SENTENCE WITHELD,

PROBATION ORDERED

The defendant, following his plea of not guilty was tried by jury on December 11, 1978, was found guilty of the crime of unfair trade practices under Section 100.20 (2) as defined by Section Ag 114.03 Wis. Adm. Code, and as made criminal offense by sec. 100.26 (3), the short designation of the offense being; Intentionally failing to furnish property owner with a contract specifing each advertising medium to be used and the size and number of insertions to be made therein, committed in this County on April 6, 1977, in violation of Sec. 100.20 (2), 100.26 (3) Stats,; and Ag 114.03 Wis. Adm. Code.

On December 28, 1978, the Court inquired of the defendant why sentence should not be pronounced, and gave the Plaintiff's Attorney, the defendant an opportunity to be heard; the defendant

having waived counsel and having appeared without counsel throughout; and

Upon all the files, records, and proceedings, the Court found the defendant eligible for probation pursuant to the provisions of Sec. 973.09, Stats and promounced Judgment and directed it to be reduced to writing as follows:

IT IS ADJUDGED that the defendant is convicted as found guilty, and sentence is withheld, and the defendant is placed on probation for a period of two years, in the custody and control of the Wisconsin Department of Health and Social Services, subject to its rules and orders, and subject to making payments for restitution $625.00, Costs $60.60, Support $None, in the manner prrscribed by the Department and subject to the following conditions; Resitution is to be made to Gordon Helland, complaining witness herein, through the Clerk of

Courts for Price County; And, in addition, the defendant is sentenced to pay a fine in the amount of $625.00;"

"The Sheriff is Ordered to deliver the defendant into the custody of the Department as it directs." Dated December 28, 1978

BY ORDER OF THE COURT,

/s/ Marlene Charbonneau Clerk of Courts

ORDER

The defendant, having been on this 28th day of December, 1978, convicted of the crime of unfair trade practices as defined in sec. 100.20 (2),Wis. Stats., and Ag 114.03. Wis. Adm. Code., and sentenced under the provisions of sec. 100.26 (3), of Wis. Stats, applicable thereto, said sentence consisting of:

1. Two years probation as a condition of which it was provided that $625.00 restitution to Gordon Helland, complaining witness, be made, and

2. A fine of $625.00 plus costs of $60.60 be paid to the Clerk of Court for Price Co nty.

Immediately thereafter the defendant declared to Mr. Charles Dunlap that he would not sign a probation agreemeent; thay he would not pay the fine and the restitution, or either. Whereupon, Court was reconvened and the above declarations were made in open Court on the record with the addition that in spite of his beinng well able to do so, that he would not make any payment regardless of the outcome of his appeal; therefor, upon the papers, pleadings and the declarations of the defendant and pursuant to sec. 973.07, Wis. Stats.,

IT IS ORDERED, that the defendant be, and he hereby is, committed to the Price County jail for six months, or until such earlier time that the restitution, fine and costs provided for in the

judgment of conviction are paid to the Clerk of Circuit Court for Price County, the Clerk to hold all said amounts in trust pending and in accordance with the disposition of defendant's appeal. Dated this 28th day of December, 1978.

BY THE COURT:
/s/ DAVID A. CLAPP CIRCUIT JUDGE

APPENDIX "C"

TIMELY OBJECTION TO INSTRUCTION's TO JURY.

Record page 77.

THE COURT: Now, What about the instructions, other than your motion that the whole thing should be scrubbed in this case, Mr. Abdella, do you have any objections to the instructions as they appear?

MR. ABDELLA: Well, the thing that is omitted there, your Honor, is, always, "Contrary to fact"; you see, even the Court feels that, irregardless, that the medium should be inserted in the contract.

Record page 78.

It states, the section states, that representations shall not be made contrary to fact.

THE COURT: No, no, no; that isn't where we are at.

(REPORTER'S NOTE: Whereupon, there was a short pause.)

THE COURT: Okay. "Ag 114.03 Contracts. No person soliciting advance fees shall ....."--

MR. ABDELLA: Right herem definitions; "Misrepresentations. No person in soliciting advance fees or contracts therefor shall make any of the following represenations contrary to the fact:"

The Court refused to insert the definition in the instructions as well as the Jury Verdict prepared by the Court: the following was presented to the jury:

We, the jury, find the defendant, Peter J. Abdella, guilty of unfair trade and

competition by intentionally failing to furnish the property owner with a contract specifying each advertising medium to be used and the size and number of insertions to be made therein.

HEARING ON MOTION FOR NEW TRIAL

Motion to the Court for a directed verdict of Not Guilty, or, for a new trial. Hearing held on motion December 28, 1978, Abdella asked the Court for a Directed Verdict of Not Guilty, notwithstanding the jury verdict, or, for a new trial,. In that the instructions of the Court, as well as the verdict sheet were in error.

REPORTER'S NOTES OF HEARING

Page 13.

MS. LIEDTKE. We are not saying that he failed to advertise, or that he advertised deceptively. We are saying that he gave a contract and it did not state what he was going to do.

Page 15.

THE COURT: The Court's instructions on the substantive offenses were prepared in advance over the entire weekend; and, they were typed so as to be available to both counsel at the first recess, 100:00 o'clock in the morning as the record will show. There was no objection made to those instructions then or later, and, under those circumstances, any objection now is not timely made, let alone renewed.

Page 17.

MR. ABDELLA: The statement was made that there was no objection to the instructions to the jury, and the record is going to show otherwise.

CERTIFIED COURT REPORTER's TRANSCRIPT.

The transcript will show the trial started at 9;00 o'clock A. M. with no recess that morning.

Page 39.

The transcript will show there was no recess in the afternnon, until the close of the trial, at which time the instructions were first discussed.

TESTIMONY OF GORDON HELLAND

DIRECT EXAMINATION BY DISTRICT ATTORNEY

MS. LIEDTKE: page 7.

Q When did you first meet Mr. Abdella ?

A We found an ad in the Milwuakee Journal paper from that ad they said that they had, The Locators, had qualified buyers waiting for new listings as so 1 called Mr. Abdella, 1 called the Locators.

page 9.

Q What did he tell you ?

A He told me they had a way of pre screening the buyers and so that 1 would only receive qualified buyers.

Q page 10. You testified that he said that he would screen buyer, did he elaborate on that at all ?

A He said through their method of advterising that they prescreened the buyers and they were able to check bank records, and so that 1 wou ld only receive people that, you know, that had enough money to buy.

CROSS EXAMINATION

BY MR. ABDELLA:

Page 42.

Q Now, on April 6. 1977, you entered into a contract for advertising services for the sale of your real estate, budiness, fixtures and eqipment, is that right ?

A Yes, that's correct.

page 45

Q A contract is to relay the intents of the parties; now, was there anything in this contract that you objected to as to terms, conditions, the promises and what the contract represented ?

A 1 dont believe so, no.

Page 46.

Then, it continues, "The Locators agree to take the above application and advertise it through their medium, their method of forwording information to screened and qualified prospects obtained as a result of their advertising method."?

A. 1 believe so.

Q. And, you singed the contract ?

A. Yes, 1 did.

Page 48.

Q. Do you have any knowledge that the Locators do not pre-screen and pre-qualify the prospects obtsined as a result of their advertising ?

A. 1 dont have any knowledge to that effect.

Page 54.

Q. Now, isnt it a fact that the reason you liked and entered into this advertising agreement is the method of operation of the Locators; by that 1 mean.through their extensive adv-

ertising which you were shown in metropolitan newspapers, as well as national publications in which they offered a free list of business opportunities, farms, recreational properties and so forth, and that you were told that there were thousands of prospective buyers accumulated through this method and that rather than you as an individual, attempting to find a buyer, that the advertising medium spends thousands of dollars to have on hand and draw fro them when a client decides to buy, you draw from a full list of services ?

Page 55.

THE COURT: Question mark; did you like that method that Mr. Abdella says he told you or did you not ?

THE WITNESS: I liked it yes.

Page 61.

Q. Now, the next one; now, the next one was that in this contract, that you

did not receive a true copy identifing each advertising medium to be used therein; now, did you understand that you were to receive your advertising in any particular paper ?

A. No, because you said that you were going to use your method of advertising.

Q. In other words, it was perfectly clear that Catawba Implement Sales, or whatever it is, was not to receive individual advertising because that would have been contrary to the method of the company; but, rather, that the prospectus was going out to the screened and qualified buyers, is that correct ?

A. Yes, sir, that's correct.

APPELLATE COURT HAD ENTIRE RECORD ON APPEAL, AND PETITIONERS BRIEF FULLY COVERED THE DEFECTS OF THE TRIAL IN LOWER COURT.